Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Public Notice on Interpretation of the Terms	)	MB Docket No. 12-83
"Multichannel Video Programming Distributor"	)	
and "Channel" as Raised in Pending	)	
Program Access Complaint Proceeding	)	
	)	
Complaint of Sky Angel U.S., LLC	)	MB Docket No. 12-80
Against Discovery Communications, LLC, *et. al.*	)	
For Violation of the Commission's Competitive	)	
Access to Cable Programming Rules	)	

REPLY COMMENTS OF SKY ANGEL U.S., LLC

SKY ANGEL U.S., LLC

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EXECUTIVE SUMMARY

Sky Angel U.S., LLC ("Sky Angel") provides an affordable, nationwide, subscription-based service of approximately eighty linear channels of exclusively family-friendly video and audio programming, including many of the nation's most popular non-broadcast networks. Sky Angel's securely encrypted programming can only be accessed through its proprietary set-top box, which receives the programming streams through a subscriber's broadband Internet connection and which attaches directly to a television set.

As Sky Angel detailed in its initial comments, its innovative service is exactly the type of competitive alternative to cable that Congress sought to encourage when it created a broad, open-ended definition of a multichannel video programming distributor ("MVPD") and enacted the program access requirements to protect emerging competitors from the monopolistic practices of entrenched cable operators and their affiliated programmers. Sky Angel provided extensive legislative history and Commission and judicial precedent demonstrating beyond a doubt that, in order to qualify as an MVPD entitled to the protections of the program access rules, an entity need not be "facilities-based" or provide all necessary transmission paths for the distribution of its programming. Congress' repeated use of the term "channel," in an everyday sense, to mean a "programming network," as well as the fact that a non-facilities-based distributor is expressly identified in the statutory definition of an MVPD, leaves no room for a different interpretation. Moreover, Congress' primary goal was to benefit consumers by increasing competition in the video distribution marketplace. Exactly like a cable system, Sky Angel's subscription service provides multiple networks of live, linear video programming that are accessed on a television set through a set-top box. Accordingly, from a consumer perspective, Sky Angel offers a

functionally identical service, and therefore provides the exact type of competition Congress intended.

A majority of commenters representing a broad array of participants in the video distribution marketplace, but of course excluding the incumbent cable industry, similarly urged the Commission to interpret the MVPD definition in accordance with its express statutory terms, and in the manner Congress intended, and thus find that Sky Angel qualifies as an MVPD entitled to the protections of the program access rules. As detailed below, in addition to agreeing with Sky Angel that, as a matter of law, the Commission is foreclosed from interpreting the MVPD definition to require that an entity be facilities-based or provide all necessary transmission paths, these commenters detailed, and fully supported, why a finding that Sky Angel qualifies as an MVPD would substantially advance the public interest, including by increasing competition (and thereby encouraging innovation and lowering subscription rates), promoting programming diversity, encouraging broadband adoption, ensuring regulatory parity, and increasing the distribution, and thus revenue, of content providers, including broadcasters.

In contrast, if the Commission improperly excludes all Internet-based distributors from the scope of the MVPD definition, various negative consequences would follow that go well beyond the "traditional" MVPD marketplace. For instance, entrenched MVPDs could prevent new entrants from being first-to-market in the next generation MVPD marketplace, and thereby monopolize that market in a way Congress intended to prevent with respect to the video distribution market in general. And, in the process, they could simply "opt out" of the various consumer-oriented FCC regulations applicable to MVPDs. At the same time, the imposition of these regulations, which are not nearly as expansive or burdensome as some commenters claim, would subject only a small number of Internet-based distributors to the Commission's rules

because, with respect to Sky Angel's program access dispute, as well as the Public Notice that arose out of that dispute, the Commission should tailor its decision to the specific facts of Sky Angel's service. Even if the Commission makes a determination broader than Sky Angel's particular service, the effects of that decision still would be narrow in scope because of the limits imposed by the express language of the statutory definition of an MVPD.

The statutory language, legislative history, and Commission precedent all clearly and indisputably lead to a single conclusion – that an entity need not be facilities-based or provide all necessary transmission paths to qualify as an MVPD entitled to the protections of the program access rules. As a result, an entity such as Sky Angel, which fully meets all of the express statutory requirements and which provides a service functionally identical to "traditional" MVPDs from a consumer perspective, qualifies as an MVPD as a matter of law. The Commission has had all necessary precedent in this respect before it for nearly twenty years, and now also has additional public comment that clearly supports the proposed, and proper, interpretation that an MVPD is any entity that "makes available for purchase, by subscribers or customers, multiple networks of video programming" regardless of the particular distribution technologies it uses. Because the Commission has a legal duty to expeditiously resolve Sky Angel's program access complaint,[1] and because Discovery's withholding of programming from Sky Angel's subscribers and potential subscribers is clearly a discriminatory act in violation of the program access rules, the Commission should immediately find in favor of Sky Angel and grant all of the relief requested in its program access complaint.

[1] *See* 47 U.S.C. §548(f) ("The Commission's regulations shall – (1) provide for an expedited review of any complaints made pursuant to this section") (emphasis added).

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REPLY COMMENTS OF SKY ANGEL U.S., LLC

Sky Angel U.S., LLC ("Sky Angel") submits these reply comments in response to the Public Notice released by the Media Bureau (the "Bureau") on March 30, 2012 in the above-captioned proceeding and the comments filed in response to the Public Notice. As detailed in its initial comments, and as further demonstrated by other commenters, Sky Angel's innovative service clearly fits within the express terms of the broad, open-ended statutory definition of a multichannel video programming distributor ("MVPD"), which Congress enacted to increase competition in the video distribution marketplace for the benefit of consumers. Further, as Sky Angel's dispute with Discovery Communications, LLC ("Discovery") demonstrates,[1] this type of emerging programming distributor requires the program access rules to protect them from the anti-competitive actions of entrenched MVPDs and their affiliated programmers. Unfortunately, with the Public Notice, the Commission seems so preoccupied with resolving the claims made by Discovery in defending its anti-competitive actions towards Sky Angel, the Commission appears

[1] Discovery's actions towards Sky Angel refute the claim made by the Motion Picture Association of America ("MPAA") that the FCC need not intervene because the "market is working well." *See* Comments of MPAA at 3.

to have lost sight of Congress' fundamental goal – to assure consumers the benefits of competition that can only emerge if potential competitors have fair access to programming.[2] The Commission also has ignored its own commitment to resolve program access complaints within five months.[3]

I. INTRODUCTION

As a matter of law, the Commission must interpret "channels" to require only that an entity "make[] available for purchase, by subscribers or customers, multiple [networks] of video programming" in order to qualify as an MVPD entitled to the pro-competition, pro-consumer protections of the program access rules. The alternate proposal – that an entity must be "facilities-based" and provide all necessary transmission paths – would conflict directly with the statutory definition of an MVPD, which expressly includes a non-facilities-based distributor as an example. Likewise, the Commission has previously held that an entity need not be facilities-based or otherwise operate the vehicle for distribution to qualify as an MVPD. Nor can a cable-specific definition of "channel" be reconciled with the various non-cable entities specifically and traditionally defined as MVPDs. And, as Sky Angel detailed in its initial comments, Congress and the Commission contemporaneously understood and repeatedly used the term "channel" to mean "programming network." This interpretation also substantially advances the public interest goals Congress sought to achieve in enacting the program access regime, while the alternate proposal would continue to permit entrenched MVPDs to discriminate against emerging competitors and further secure their current market dominance.

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[2] *See* Comments of Public Knowledge at 14 ("[T]he problem [Congress] sought to solve – consumer harms caused by a lack of sufficient competition – persists today. And the solution is the same: a service-oriented approach to the video market that permits MVPDs using any technology to compete with established cable systems.").

[3] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 13 FCC Rcd 15822, 15841 (1998) ("[T]he adoption of time limits for the resolution of program access disputes can enhance competition in the video marketplace by providing certainty to program access litigants that their complaints will be timely resolved."); *id.* at 15842 ("[D]enial of programming cases … should be resolved within five months of the submission of the complaint to the Commission.").

A majority of commenters, including other Internet-based video programming distributors, the broadcasting industry, public interest and consumer groups, a writers' labor organization, a "traditional" MVPD, and a more recent entrant into the MVPD marketplace, similarly urged the Commission to interpret the MVPD definition in the manner Congress intended. For instance, the Affiliates Associations explained that "[t]he expansive language of Section 602(13) of the Act is sufficiently broad, on its face, to bring within its reach entities that distribute multiple streams of linear programming to subscribers via an Internet broadband connection."[4] DIRECTV noted that the alternative "interpretation, which would require an MVPD to supply a 'transmission path,' is foreclosed as it would conflict directly with the statutory definition."[5] And Public Knowledge urged the Commission to "clarify that online video providers such as Sky Angel are 'multichannel video programming distributors'" because "[o]nly a technology-neutral reading of the term is consistent with the text and purpose of the Communications Act."[6]

Likewise, Syncbak explained that, because the "definitions at issue were adopted well before the availability of residential broadband service capable of supporting a robust MVPD service," the Commission "should read those definitions in view of the underlying policy goals of promoting competition and consumer choice… The policy goal should be to best serve consumers, not to interpret old definitions and rules that were intended to foster competitive

[4] Comments of ABC Television Affiliates Ass'n, CBS Television Network Affiliates Ass'n, and NBC Television Affiliates ("Affiliates Associations") at 2; *see id.* at iv ("The expressly open-ended and flexible statutory definition of 'MVPD' should be read to account for technological developments in the years since its 1992 enactment."); *id.* at 4 ("It is unsurprising the illustrative list does not include online or Internet-based video programming distributors, as the 1992 Cable Act preceded widely available broadband Internet access by many years.").

[5] Comments of DIRECTV, LLC at 2.

[6] Comments of Public Knowledge at 1; *see id.* ("[T]his reading is consistent with the technologically-neutral approach Congress has taken to video competition since the Cable Television Consumer Protection and Competition Act of 1992, and as such, no statute stands in the way of this pro-consumer, pro-competitive understanding of the law."); Comments of Telecommunications for the Deaf and Hard of Hearing, Inc., National Ass'n of the Deaf, American Foundation for the Blind, Deaf and Hard of Hearing Consumer Advocacy Network, Hearing Loss Ass'n of America, and Ass'n of Late-Deafened Adults ("Consumer Groups") at iii (urging "the Bureau to reject a technical interpretation of MVPDs that would depend on a narrow, cable-specific understanding of 'channels.'").

services in a way that erects new barriers to entry."[7] The Writers Guild of America, West ("WGA") similarly recognized that the "inclusion in the MVPD definition of entities that make use of third-party facilities to provide video programming would be consistent with Congressional intent to enhance competition in video programming distribution."[8] And the Consumer Groups noted that this common-sense interpretation would "encompass[] all entities, including Sky Angel, that deliver what consumers understand to be multiple 'channels' of programming."[9]

In contrast, all comments filed by cable operators, as well as its trade association, urged the Commission to adopt a narrow, technology-specific MVPD definition, and thereby constrain a new type of competition from emerging video programming distributors like Sky Angel. But these arguments are not surprising considering that the cable industry has always engaged in this sort of anti-competitive tactic. For instance, leading up to Congress' vote on the 1992 Cable Act, Senator Metzenbaum, who co-sponsored the Senate bill, noted that "[t]he cable industry is howling about the conference report precisely because it will curb their monopoly power. That is why the industry has launched a deceptive propaganda campaign which distorts the truth about this legislation."[10] Similarly, Senator Gorton, another co-sponsor, noted that "[t]he access to

[7] Comments of Syncbak, Inc. at 12; *see id.* at 1 ("Syncbak urges the Bureau to acknowledge that 'channels' and MVPD services can be provided through Internet distribution if those services look and function like traditional MVPD services provided over other platforms.").

[8] Comments of WGA at 1.

[9] Comments of Consumer Groups at iii; *see* Comments of Saga Communications, Inc. at 2 ("Whether programming content is delivered by cable, satellite, MMDS, or the Internet, is irrelevant to the consumer. Thus, whether the entity offers a transmission path is irrelevant to whether it qualifies as an MVPD."); Comments of M3X Media, Inc. at 5-6 ("Irrespective of whether the 'multiple channels of video programming' are provided via traditional MVPDs or by online multichannel video distributors, they function equivalently as systems for multichannel video distribution."); Comments of Affiliates Associations at 6 ("Common sense dictates that distributors delivering via the Internet programming streams similar to the programming delivered by 'traditional' MVPDs should be considered MVPDs as well, without regard for the mechanics of the delivery of those programming streams…").

[10] 138 Cong. Rec. S14252, S14252, 1992 WL 231938 (Sept. 21, 1992) (statement of Sen. Metzenbaum); *see* 138 Cong. Rec. S13576, S13577, 1992 WL 225917 (Sept. 16, 1992) (statement of Sen. Metzenbaum) ("The vehemence and the scope of cable's disinformation campaign represents the last, desperate act of a monopoly struggling to maintain its unbridled authority over consumers."); 138 Cong. Rec. H8671, H8677, 1992 WL 228239 (Sept. 17,

programming … provisions are critically important tools to promote competition. No wonder this is the single provision cable has fought the hardest. Once again, cable fears an end to its monopoly."[11]

Commission rulemaking proceedings implementing the 1992 Cable Act also demonstrate that the cable industry will argue whichever way best suits its present anti-competitive interests, and thus, its continued market dominance. For instance, shortly after enactment of the 1992 Cable Act, the Commission sought comment regarding the new cable rate regulation provisions, which "permit[] regulation of a cable system's subscriber rates only if th[e] Commission finds that the cable system is 'not subject to effective competition.'"[12] Because two of the three tests used to determine whether a cable system is subject to effective competition, and therefore cannot be rate regulated, involve competition from other MVPDs in the cable system's local franchise area, the Commission specifically sought comment on what services qualify as MVPDs for this purpose.

In response, the cable industry uniformly argued in favor of a broad interpretation of the MVPD definition, as this would make it less likely that the Commission could regulate its rates. For instance, Tele-Communications, Inc. ("TCI"), whose CEO at the time was John Malone (and

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1992) (statement of Rep. Cooper) ("We have witnessed one of the most unscrupulous lobbying campaigns of modern times. Every cable customer has gotten a misleading flier, and there have been countless cable ads that are terribly misleading. We need to stand up for the truth in this body. We need to stand up for competition.").

[11] 138 Cong. Rec. S14222, S14247, 1992 WL 231936 (Sept. 21, 1992) (statement of Sen. Gorton); *see id.* (statement of Sen. Gorton) ("The cable industry has spent millions of dollars launching what I would consider to be a massive misinformation campaign to confuse consumers and to cloud the issues because that industry recognizes that this bill is going to result in the one set of features which it most fears: Consumer choice, an end to the cable television monopoly and what every other unregulated business in America already faces, competition."); 138 Cong. Rec. S13467, S13467, 1992 WL 224280 (Sept. 15, 1992) (statement of Sen. Lieberman) ("It is especially important now for all of us who support this measure to speak out on the strengths of the legislation in view of the massive and misleading advertising campaign that the cable industry is conducting against it.").

[12] *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992; Rate Regulation*, Notice of Proposed Rulemaking, 8 FCC Rcd 510, 512 (1992).

who now is in control of Discovery),[13] argued that "[t]he plain language of the Act establishes that the term multichannel video programming distributor be broadly construed" because it "states explicitly that Congress' list of multichannel video programming distributors is illustrative, not exhaustive."[14] TCI further noted that "[a] broad definition of multichannel video programming distributor would serve the statutory goal, and enable the FCC to accommodate future advances."[15] TCI also weighed in on two other issues at the center of the current proceeding – namely, the definition of "channel" and the need for an entity to be "facilities-based" to qualify as an MVPD. Specifically, TCI urged that "[a]ny distributor offering multiple video programming choices to viewers should reasonably be considered a multichannel video programming distributor."[16] It also recognized that "[t]he statutory definition of a multichannel video programming distributor does not mandate that a distributor be facilities-based as a prerequisite to inclusion in the statutory definition. Rather, by including TVRO distributors in the definition Congress has recognized that video programming distributors exist in various forms."[17]

Likewise, Continental Cablevision argued that "[t]he plain language of the 1992 Act establishes that the term 'multichannel video programming distributor' is to be broadly construed," noting that "[t]he statute states explicitly that Congress' list of multichannel video programming distributors is illustrative, not exhaustive."[18] Continental Cablevision added that

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[13] *See News Corp. and The DIRECTV Group, Inc., Transferors, and Liberty Media Corp., Transferee, For Authority to Transfer Control*, Memorandum Opinion and Order, 23 FCC Rcd 3265, 3300-01 (2008).

[14] Comments of TCI, MM Docket No. 92-266, p. 13 (Jan. 27, 1993) (emphasis added).

[15] *Id.* at 13-14.

[16] *Id.* at 14 (emphasis added).

[17] *Id.* (emphasis added).

[18] Comments of Continental Cablevision, Inc., MM Docket No. 92-266, p. 6 (Jan. 27, 1993); *see* Reply Comments of Cablevision Industries Corporation, MM Docket No. 92-266, p. 35-36 (Feb. 11, 1993) ("The definition of an multichannel video programming distributor should be broad, and not restricted to service providers that offer the same or more programming as the cable operator.").

"[t]he adoption of a broad definition would also encompass future advances or rules changes."[19] Also like TCI, Continental Cablevision noted that "[n]othing in the statutory definition of a multichannel video programming distributor requires distributors to be 'facilities-based' before they can be included. In fact, by including TVRO distributors in the definition, Congress has already recognized the contrary."[20] Similarly, Comcast noted that "[t]he examples provided in section 602(12) … plainly reveal Congress' intent to include virtually any source of multichannel programming."[21] Comcast therefore urged "that the Commission make this determination not only with an eye on current market conditions, but with a view toward how, and how quickly, the world is changing."[22] And the California Cable Television Association, in discussing video dialtone services, argued that "[t]he fact that multiple channels of programming are available through a menu should satisfy the requirement of 'making multiple channels of video programming available.' The fact that it is delivered through only one or two channels is a technological distinction without a practical difference."[23] Even ***Discovery*** weighed in, urging the Commission to "define the term 'multichannel video programming distributor' as broadly as possible."[24]

The Commission also sought comment twenty years ago on the scope of the MVPD definition in its rulemaking proceeding implementing the Cable Act's retransmission consent provisions.[25] In response, "[c]ommenters generally agree[d] that the definition of 'multichannel

[19] Comments of Continental Cablevision, Inc., MM Docket No. 92-266, p. 7 (Jan. 27, 1993).

[20] *Id.* at 7 (emphasis added).

[21] Comments of Comcast Corporation, MM Docket No. 92-266, p. 12 (Jan. 27, 1993) (emphasis added); *see id.* at 7 ("[P]remium movie channels such as HBO and Showtime…") (emphasis added).

[22] *Id.* at 9.

[23] Reply Comments of the California Cable Television Association, MM Docket No. 92-266, p. 12 (Feb. 11, 1993).

[24] Comments of Discovery Communications, Inc., MM Docket No. 92-266, p. 4 (Jan. 27, 1993) (emphasis added).

[25] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Broadcast Signal Carriage Issues*, Notice of Proposed Rulemaking, 7 FCC Rcd 8055, 8065 (1992).

distributor' should be interpreted expansively, since such distributors are 'not limited to' the categories specifically enumerated."[26] For instance, a consortium of cable operators that jointly filed comments and Time Warner Entertainment, which at the time owned Time Warner Cable ("TWC"), both noted that "the statutory language is clear that the definition of a multichannel video programming distributor is not limited to the examples given and encompasses any person who makes available multiple channels of video programming for sale to subscribers."[27] In addition to the statutory language itself, these commenters noted that "the legislative history makes clear that the term 'multichannel video programming distributor' was to be interpreted broadly."[28] They also agreed that "[a]s long as all three elements of the statutory definition are met, *i.e.*, the entity: (1) makes available multiple channels of video programming (broadcast, non-broadcast or both); (2) for purchase; (3) by subscribers or customers, that entity qualifies as a multichannel video programming distributor…"[29]

In short, most commenters in this proceeding point out the obvious – that Sky Angel readily falls within the statutory definition of "MVPD" under the Commission's program access rules. In contrast, cable-based incumbent MVPDs and Discovery (which is under common control of incumbent MVPD interests), which oppose Sky Angel, have been forced to reverse their previous positions of record – that the MVPD definition is very broad and not dependent on being facilities-based. The Commission should give no weight to these incumbent MVPDs,

[26] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, Report and Order, 8 FCC Rcd 2965, 2996 (1993); *see id.* at 2997 ("[T]he list of multichannel distributors in the definition is not meant to be exhaustive…").

[27] Comments of Adelphia Communications Corp., *et al.*, MM Docket No. 92-259, pp. 23-24 (Jan. 4, 1993) (emphasis in original); Comments of Time Warner Entertainment Company, L.P., MM Docket No. 92-259, pp. 32-33 (Jan. 4, 1993) (emphasis in original).

[28] *Id.* at 24 & 33, respectively.

[29] *Id.*

which take an unsupported anti-competitive and anti-consumer position in direct contradiction to their opposite positions of record.[30]

II. A PARTICULARIZED FINDING THAT SKY ANGEL QUALIFIES AS AN MVPD WOULD NOT HAVE FAR-REACHING IMPLICATIONS

Certain commenters exaggerated the potential effect of a Commission finding that Sky Angel qualifies as an MVPD entitled to the pro-consumer benefits of the program access rules. For instance, Cablevision alleged that "de-coupling MVPD status from facilities ownership or control would effectively enable *anyone* to leverage the offering of a *handful of amateur video clips* into a right to demand access to high quality programming networks,"[31] and Comcast claimed that "vertically-integrated programming networks potentially would face program access claims from *thousands* of Internet video service providers."[32] In addition, Discovery argued that, "[i]f the same programming network is available through an *unknown and unlimited number* of online sources, that network's value to the facilities-based MVPD may be diminished, as may be the price the MVPD is willing to pay for it."[33] The Commission must not allow such absurd hyperbole to distract it from the particular facts of Sky Angel's service or skew the straight-forward statutory interpretation it must address with respect to Sky Angel's program access complaint.[34]

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[30] More than a year ago, Sky Angel requested that the Commission issue sanctions against Discovery for lack of candor in this proceeding, and to investigate whether Discovery affirmatively misrepresented its alleged "harm" at an early stage. *See* Motion of Sky Angel U.S., LLC for Imposition of Sanctions Against Discovery Communications, LLC for Lack of Candor and for Possible Misrepresentation (filed May 27, 2011). In addition, the Commission should consider Discovery's unexplained reversal of position as part of its consideration of Discovery's lack of candor in this proceeding.

[31] Comments of Cablevision Systems Corporation at 4 (emphasis added).

[32] Comments of Comcast Corporation at 10 (emphasis added).

[33] Comments of Discovery at 12.

[34] *See* Comments of Affiliates Associations at iii ("[T]he task of statutory construction in this instance is not complex.").

As Sky Angel noted in its comments, "a particularized finding that Sky Angel qualifies as an MVPD would not have 'far-reaching' implications… Sky Angel provides real-time, linear feeds of programming networks, identical to 'traditional' MVPDs, while most, if not all, other distributors that provide content via hardware connected to a broadband Internet connection offer only non-linear, on-demand content. In addition, unlike the vast majority of Internet-based video distributors, Sky Angel does not distribute programming on the World Wide Web, but rather relies in part on subscribers' broadband Internet connections as one path in its distribution system."[35] The particular facts of Sky Angel's service have been on record before the FCC for approximately two years, and in summary are:

- Sky Angel enters into definitive written agreements with program providers/rights holders for distribution of programming to Sky Angel subscribers via its IPTV system.
- Sky Angel enters into subscription relationships with consumers for multiple, live linear channels of programming, who are sent Sky Angel set-top boxes, which are necessary to receive programming from Sky Angel and which Sky Angel directly and remotely controls at all times.
- Sky Angel receives content from programmers, and then processes and encrypts it.
- Sky Angel transmits the encrypted programming to its headends via fiber it controls.
- The encrypted programming then is distributed to Sky Angel subscribers, in part through Internet connections which those subscribers have contracted for from ISPs.
- The programming is received by the Sky Angel set-top boxes, decrypted, and then transmitted to subscribers' television sets with industry-standard copy protections.
- At no time is the World Wide Web, or home computers, part of the Sky Angel service.
- Sky Angel exclusively controls the origination, distribution, and reception of all programming, and at no time may anyone receive the programming except authorized subscribers via their authenticated set-top boxes.

Therefore, a decision appropriately tailored to the specific facts of Sky Angel's service, which is all the program access dispute proceeding calls for at this stage, likely would affect only Sky Angel at this time, and would never affect "thousands," or "an unknown and unlimited

[35] Comments of Sky Angel at 8.

number," of video programming distributors. Commenters on both sides of the issues presented in the Public Notice agree that this limited finding is the most appropriate course for the Commission to take at this time.[36]

In the alternative, if the Commission feels compelled to interpret the MVPD definition with respect to services different from Sky Angel, and thereby expand the proper scope of the proceeding, or otherwise consume additional time (it took the FCC approximately two years, and scrutiny from the D.C. Circuit, to even assign a docket or file number to Sky Angel's complaint), then it should immediately grant Sky Angel's *Renewed Petition for Temporary Standstill*, which was filed in May 2011 but never acted on by the Commission. Only then would Sky Angel not be substantially, and unnecessarily, prejudiced by the broader scope of any Commission inquiry or unwarranted continuing delay. Grant of a standstill would be without prejudice to any ultimate decision on the merits.

Moreover, even if the Commission makes a determination broader than Sky Angel's particular service, the exaggerated concerns of some commenters still would be unwarranted because the effects of that decision also would be limited in scope. As DIRECTV noted, the MVPD definition:

> [I]dentifies at least three important qualifications for an MVPD. First, it must offer programming 'for purchase.' Accordingly, web sites and other sources that offer programming for free would not qualify. Second, it must offer programming for purchase 'by subscribers or customers.' Accordingly, wholesalers and resellers would not qualify. Third, it must offer multiple 'channels of video programming,' which means that entities that do not provide multiple video programming networks (as opposed to a single network or individual programs or movies) would not qualify.[37]

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[36] *See, e.g.*, Comments of Open Internet Coalition at 1 ("[T]he Commission should focus narrowly on the issues presented in the program access complaint filed by Sky Angel U.S., LLC ('Sky Angel') and should avoid making a decision that would have far-reaching implications for providers of online video."); Comments of M3X at 9 ("Without prejudice to the Sky Angel proceeding, the Bureau could also recommend to the Commission that it institute rulemaking proceedings to develop online MVPD requirements.").

[37] Comments of DIRECTV at 13.

This set of statutory qualifications therefore will "ensure that the class of entities that qualify as MVPDs will remain appropriately limited."[38] In other words, the "action would not redefine all online video platforms as MVPDs… Rather, only those MVPDs that closely emulate traditional, channel-based MVPDs will be affected."[39] Accordingly, by properly interpreting the MVPD definition, the Commission would "both promote new entry and competition without extending regulations to any services that do not wish to operate as MVPDs,"[40] exactly as Congress intended and the public interest demands.

III. AN MVPD NEED NOT BE FACILITIES-BASED OR PROVIDE ALL NECESSARY TRANSMISSION PATHS

As Sky Angel and other commenters noted, the Commission already has expressly held that the MVPD definition does not require that an entity be "facilities-based" or directly provide all necessary transmission paths.[41] Specifically, in first implementing the 1992 Cable Act, the Commission agreed with commenters "that, by including television receive-only satellite programming distributors in the definition of a multichannel video programming distributor, Congress showed that a distributor need not be facilities-based in order to come within the scope

[38] *Id.*; *see id.* at 13-14 ("As a result, third parties against which MVPDs have certain rights (such as cable-affiliated programmers and broadcasters) will not be inundated with new demands. Moreover, because these new MVPDs would provide the same sort of linear programming provided by traditional MVPDs, these third parties would not be required to offer their programming in different packages or as disaggregated parts.").

[39] Comments of Public Knowledge at 1; *see id.* at 21 ("[B]y clarifying that a 'channel' can be provided online, the Bureau would not somehow transform current services like Hulu, Netflix, and iTunes into MVPDs. While they provide 'video programming' within the meaning of the law, these services do not offer channels of programming – their content is typically available on demand.").

[40] *Id.* at 22. As it did in its initial comments, Sky Angel declines to express an opinion as to whether the Commission should ultimately rely on its ancillary authority to interpret "channels of video programming" more broadly than the term was used by Congress in 1992. This issue goes well beyond the scope of Sky Angel's service, and therefore need not be addressed in Sky Angel's program access dispute proceeding or in response to the Public Notice. *See* Comments of Affiliates Associations at 4, n. 8 ("[T]he Media Bureau need not decide in this proceeding (and perhaps should not decide absent full notice-and-comment rulemaking) whether or in what circumstances the definition of MVPD should encompass Internet-based distributors of *non-linear* programming…").

[41] *See* Comments of Sky Angel at 16-19; Comments of Public Knowledge at 9-11; Comments of Saga at 2-3; Comments of Syncbak at 1-3; Comments of Affiliates Associations at 11-13; Comments of DIRECTV at 8-10. As discussed above, various cable operators have also noted this fact to the Commission when it served their financial interests to do so.

of the effective competition test."[42] It therefore held "that a qualifying distributor need not own its own basic transmission and distribution facilities."[43] As a result, the Commission subsequently rejected an argument "that Complainants' program access protection is somehow dependent upon their ownership of transmission facilities."[44] DIRECTV recognized that the effect of these Commission holdings is that, "[a]s a matter of law, [any] conclusion that a transmission path is a necessary element for an MVPD service is simply untenable… Since [] Congress specifically provided that such satellite programming distributors *are* MVPDs, it simply cannot be the case that a transmission path is a necessary element to the definition."[45]

Similarly, when the Commission implemented the open video system ("OVS") provisions enacted by Congress in 1996, it concluded that, in addition to OVS operators, OVS "programming providers that provide more than one channel of programming clearly fit within the definition of an MVPD and that they are therefore entitled to the benefits of the program access provisions."[46] In doing so, the Commission rejected a commenter's claim "that Congress limited the applicability of the program access rules to operators of open video systems."[47] This commenter then sought reconsideration of the Commission's order, arguing that Congress' failure to add OVS programming providers to the list of representative entities in the MVPD definition was "significant, in that the listed MVPDs all operate the vehicle for distribution."[48]

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[42] *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation*, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631, 5651-52 (1993) ("*1993 Cable Rate Order*") (emphasis added).

[43] *Id.* at 5652.

[44] *Turner Vision, Inc. et al. v. Cable News Network, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 12610, 12635 (CSB 1998).

[45] Comments of DIRECTV at 9 (emphasis in original).

[46] *Implementation of Section 302 of the Telecommunications Act of 1996*, Third Report and Order and Second Order on Reconsideration, 11 FCC Rcd 20227, 20297 (1996) ("*Section 302 Recon Order*") (emphasis added).

[47] *Implementation of Section 302 of the Telecommunications Act of 1996*, Second Report and Order, 11 FCC Rcd 18223, 18324 (1996).

[48] *Section 302 Recon Order*, 11 FCC Rcd at 20298.

But the Commission denied the petition for reconsideration, finding the "argument that video programming providers cannot qualify as MVPDs because they may not operate the vehicle for distribution to be unsupported by the plain language of Section 602(13), which imposes no such requirement."[49]

Congress' inclusion of a non-facilities-based distributor in the MVPD definition, as well as the Commission's subsequent precedent, indisputably refutes several commenters' claims, which lack any supporting citations, that an entity must be facilities-based to qualify as an MVPD.[50] Further, even where these commenters cited Commission precedent, they misinterpreted such precedent or used portions of it out of context. For instance, both Comcast and ACA equate the Commission's finding that, in certain situations, a leased access provider does not provide effective competition to a cable operator with a finding that these providers do not qualify as MVPDs.[51] In reality, the Commission expressly concluded that these providers do qualify as MVPDs. Specifically, as noted above, the Commission agreed with commenters "that a qualifying distributor need not own its own basic transmission and distribution facilities."[52] However, with respect to the effective competition test only, the Commission further concluded

[49] *Id.* at 20301. Cablevision attempts to muddy this clear holding by quoting the Commission's definition of an OVS operator, which requires ownership, control, or responsibility for the management and operation of the system. *See* Comments of Cablevision at 9, n. 21. This definition of an OVS operator, however, in no way alters the Commission's conclusion that an OVS programming provider also qualifies as an MVPD despite the fact it does not operate the vehicle for distribution.

[50] *See* Comments of Discovery at 5 ("Each of the MVPDs listed in the MVPD definition – all of which are facilities-based distributors…"); Comments of National Cable & Telecommunications Association ("NCTA") at 3 ("[A]ll of the examples in the definition … are facilities-based entities…"); Comments of Cablevision at 6 ("[E]ach of the other MVPDs identified in the statutory definition of MVPD … provides facilities-based transmission pathways…"); Comments of Comcast at 3 ("As reflected in the text, structure, history, and purpose of the relevant provisions, Congress left no doubt that MVPDs are *facilities-based* providers…") (emphasis in original); Comments of American Cable Association ("ACA") at 9 ("The Commission has accordingly, when confronted with the question who is an MVPD for statutory purposes, employed a facilities-based understanding of the term.").

[51] *See* Comments of Comcast at 7; Comments of ACA at 9. Comcast also argues that other provisions of the 1992 Cable Act demonstrate that Congress intended only to encourage facilities-based competition. *See* Comments of Comcast at 5-6. But all of these provisions – a prohibition of exclusive franchises, a revision of the cable inside wiring rules, and allowing municipalities to build networks – are wholly unrelated to MVPDs generally or the program access rules, and therefore have no bearing on the proper interpretation of the MVPD definition.

[52] *1993 Cable Rate Order*, 8 FCC Rcd at 5652.

that "the facilities a multichannel distributor uses cannot be those of the [cable] operator."[53] Obviously, if a consumer can only access another programming distribution service through an existing cable system, that alternate service cannot provide adequate, or "effective," competition to the cable system. The Commission's treatment of video dialtone systems in the same order clearly supports this interpretation of its holding with respect to leased access providers. Specifically, although the Commission concluded that a video dialtone system generally "can provide effective competition to a cable operator," it found that "a joint venture between a telephone company and a cable system located in the same franchise area to offer video dialtone service cannot be considered effective competition to that incumbent cable system."[54] Thus, these commenters confuse different standards in an attempt to cobble together a legal argument.

In addition, NCTA cites to the Commission's decision in *Wizard Programming* as support for its claim that a "packager" of video programming that does not provide a transport component fails to qualify as an MVPD.[55] But NCTA has confused the facts and Commission holdings in that dispute. In reality, the defendant, SNG, was the entity that "assemble[d] the various programming packages,"[56] and the fact that SNG was an MVPD was uncontested.[57] In contrast, Wizard, who the Commission concluded did not qualify as an MVPD, was a "mass-marketer."[58] Moreover, neither entity's ownership or control of transmission paths, or the lack thereof, factored into the Commission's decision. Rather, because "[t]he program access rules are premised on the assumption that a complainant MVPD has purchased or seeks to purchase

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[53] *Id.*

[54] *Id.* at 5650.

[55] *See* Comments of NCTA at 4-5 (citing *Wizard Programming, Inc. v. Superstar/Netlink, L.L.C. and Tele-Communications, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 22102, ¶ 17 (CSB 1997)).

[56] *Wizard*, 12 FCC Rcd at 22111.

[57] *Id.* at 22106-08.

[58] *Id.* at 22111.

programming from the defendant,"[59] Wizard failed to qualify as an MVPD because it did "not purchase programming from SNG, and it [did] not sell programming to consumers."[60] In addition, Wizard was "not 'making [programming] available' to subscribers," as required by the MVPD definition, because SNG acquired and packaged the programming, and SNG handled all customer interactions, including billing.[61] This decision therefore in no way supports NCTA's claims, while other Commission precedent directly refutes those claims. For instance, when the Commission first adopted its program access rules, it noted that the term HSD distributors – a term traditionally used to refer to "television receive-only satellite program distributors"[62] – includes "many different types of entities … including entities that are commonly known as HSD dealers or *third-party program packagers*."[63]

Moreover, the "single reference to 'facilities-based' competition in the House Conference Report cannot be read as a limitation upon the otherwise broad statutory definition of MVPD, which includes no reference to the provision of a transmission 'facility' or 'path.'"[64] In fact, reliance on this lone Congressional mention of facilities-based competition would directly conflict with the statutory language, which includes a non-facilities-based distributor in the MVPD definition.[65] Clearly, then, this single reference does not "emphasize[] Congress' single-

[59] *Id.* at 22110.

[60] *Id.* at 22111.

[61] *See id.*

[62] *See* Comments of DIRECTV at 8.

[63] *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, First Report and Order, 8 FCC Rcd 3359, 3366, n. 7 (1993) (emphasis added).

[64] Comments of Affiliates Associations at 12-13; *see* Comments of Public Knowledge at 15 ("If it intended to require that MVPDs be facilities-based it could have easily said so in the statute."); *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 337 (1994) ("[I]t is the statute, and not the Committee Report, which is the authoritative expression of the law, and the statute prominently *omits* reference to generation.") (emphasis in original).

[65] *See Abell v. Spencer*, 225 F.2d 568, 570-71 (D.C. Cir. 1955) ("[O]ne sentence in a Senate report is not controlling where both houses of Congress have passed a bill containing unambiguous language to the contrary."); *U.S. v. Gonzales*, 520 U.S. 1, 7-8 (1997) ("The statutes clash only if we engraft onto §924(c) a requirement found only in a

minded focus on *facilities-based* alternatives" as Comcast would have the Commission believe.[66] Rather, Section 628(a), which expressly sets forth the purposes of the program access rules, makes no mention of promoting facilities-based competition.[67]

"For these reasons, it is not necessary for the Media Bureau to determine whether the Internet itself constitutes a 'transmission path' since a transmission path is not essential to an entity's status as an MVPD."[68] Such a determination also would be irrelevant because the program access laws are consumer-focused, and "[c]ontrol over the transmission path is completely immaterial to the consumer. The consumer is interested in the content of the programming, not the means of delivery."[69] Nevertheless, as Sky Angel previously detailed, it owns or controls significant and essential transmission paths, including satellite uplinks and downlinks, fiber connections, and the final transmission path passing through its subscribers set-top boxes.[70] It also has the legal right to distribute the programming based upon its contractual

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single sentence buried in the legislative history… We therefore follow the text, rather than the legislative history."); *U.S. v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 83 (1932) ("In proper cases, such reports are given consideration in determining the meaning of a statute, but only where that meaning is doubtful. They cannot be resorted to for the purpose of construing a statute contrary to the natural import of its terms."); Comments of ACA at 20 ("Little interpretative weight should be accorded this single sentence in the Senate Report…").

[66] Comments of Comcast at 6.

[67] *See* 47 U.S.C. §548(a); *Intl. Brotherhood of Electrical Workers, Local Union No. 474, AFL-CIO v. NLRB*, 814 F.2d 697, 699-700 (D.C. Cir. 1987) ("[C]ourts have no authority to *enforce* alleged principles gleaned *solely* from legislative history that has no statutory reference point.") (emphasis in original); *id.* at 712 ("[W]e emphasize that the Committee Reports' admonition against undue proliferation is *not* part of the Act. While a committee report may ordinarily be used to interpret unclear language contained in a statute, a committee report cannot serve as an *independent statutory source having the force of law*.") (emphasis in original); *Abourezk v. Reagan*, 785 F.2d 1043, 1054, n. 11 (D.C. Cir. 1986) ("[W]e think it plainly wrong … to regard committee reports as drafted more meticulously and as reflecting the congressional will more accurately than the statutory text itself. Committee reports, we remind, do not embody the law. Congress … votes on the statutory words, not on different expressions packaged in committee reports.").

[68] Comments of Affiliates Associations at 12.

[69] Comments of Saga at 3; *see* Comments of Public Knowledge at 10-11 ("Questions about the nature of the facilities an MVPD uses are thus inapposite. Consumers do not purchase 'a portion of the electromagnetic spectrum' when they subscribe to an MVPD. They buy access to content – in particular, to channels like NBC, ESPN, and Comedy Central.").

[70] *See* Comments of Sky Angel at 18-19; Comments of Public Knowledge at 10 ("[E]ven a traditional cable system does not necessarily provide a complete transmission path to a viewer's television: the viewer herself or a landlord might provide inside wiring, for instance.").

arrangements with its subscribers and with programmers. As such, Sky Angel is "facilities-based" as Discovery used that term in its comments. Specifically, Discovery noted that the Commission has found that the term "facilities-based," which is simply "a term of art in the telecommunications industry," "is commonly understood … to mean a carrier with some form of possessory interest in at least some of the equipment (such as a switch) used to complete calls."[71]

Commenters also noted that even Internet-based distributors lacking Sky Angel's extensive distribution system do, in fact, also provide transmission paths.[72] For instance, Syncbak described its system, which is similar to Sky Angel in several ways, to demonstrate how the transmission path between the video service provider and the consumer "is composed of a variety of interconnected physical links and multiple layers of logical links that provide the equivalent of signaling, addressing, transport and other functions."[73]

> Synbak's system, for example, relies on Internet links for its transmission path, but Syncbak itself has designed a built technical platform that relies on proprietary hardware, software to create and manage the end-to-end transmission path of each video service it distributes, from the Syncbak server to the end user. Syncbak does not simply route video into the cloud to any user at any time on any device. Syncbak (or its local partner) encodes and encrypts the programming, authenticates the user's right to the programming, initiates the stream, and provides a connection from the video source to a content distribution network ('CDN'), which in turn (and at Syncbak's behest) obtains access to additional physical links required to complete the transmission path.[74]

In other words, the "different elements of those transmission paths are owned, controlled and operated by a variety of entities, each providing a discrete service or functionality (or suite

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[71] Comments of Discovery at 6, n. 19 (quoting *APPC Services, Inc., Data Net Services, et al. v. Network IP, LLC, et al.*, Memorandum Opinion and Order, 20 FCC Rcd 2073, ¶ 15 (2005)) (emphasis added).

[72] *See* Comments of Syncbak at 7 ("[T]he Bureau's apparent belief that the transmission path for any consumer Internet video service is provided by the consumer's Internet service provider is technically and logically wrong."); Comments of Public Knowledge at 10 ("[E]ven if the Bureau decides that wireless systems do 'provide' (or 'make available') a transmission path, it is not clear that online systems do not provide transmission paths in the same way. … Given this background, since online services generally own or lease some facilities (such as servers) and 'transmit' programming partly on their own Internet connections, they 'provide' transmission paths in the same sense as other MVPDs.").

[73] Comments of Syncbak at 7-8.

[74] *Id.* at 8.

of services and functionalities)."[75] Accordingly, although "the consumer's ISP may play a role," it certainly does not "'provide the transmission path.' At best, it provides a portion of the transmission path. And it does not even do that on its own behalf – it does so in fulfillment of contractual relationships under which it is paid and obligated to provide that service to the consumer, on one end, and Syncbak's CDN, on the other."[76] Moreover, "in many if not most cases, the consumer's ISP does not even provide the terminating link in the path. The final link for in-home viewing is commonly provided via Ethernet or WiFi, beyond the ISP's network demarcation point."[77] Sky Angel even controls a transmission path beyond that point because its encrypted programming cannot be viewed without the proprietary set-top box, which Sky Angel directly and remotely controls at all times.[78]

Commenters also agree with Sky Angel that no basis exists to find that a video programming distributor using in part broadband Internet connections must have any type of common ownership, affiliation, or other business arrangement with Internet service providers in order to "make available" multiple channels of video programming.[79] For instance, the Affiliates Associations noted that "[s]uch a regulatory definition would be unpredictable, unnecessarily complicated, and, ultimately 'unworkable,'" as demonstrated by the questions and hypotheticals

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[75] *Id.*

[76] *Id.*; *see id.* ("The consumer's ISP is simply a passive carrier for a portion of the link, no more or less important to the transmission path than the link from the Syncbak server to the CDN or the protocols and authentication methods Syncbak uses."). *See also* Comments of M3X at 5, n. 12 ("Consumers have by all intents extended their 'pull' to the online MVPD's portal, whereupon recognition of the consumer's device, the MVPD establishes the IPTV communications path in the mixed use packet switched network context. M3X asserts the applicability of the Carterphone principle to the customer's ISP as well; otherwise how else would the end-user consumer device become connected to access the path.").

[77] Comments of Syncbak at 8; *see id.* at 9 ("Obviously, when Syncbak service is used by consumers a transmission path exists. That path is made through a variety of interconnected physical and logical links. But it is *defined* and *created*, and therefore it is *provided*, by Syncbak. Certainly, if the question is whether the consumer's ISP or Syncbak is the provider, the answer is easy: Syncbak is the provider.") (emphasis in original).

[78] *See* Comments of Sky Angel at 19.

[79] *See id.* at 34-35.

outlined in the Public Notice.[80] And M3X Media explained that requiring even a minimal affiliation would deter increased competition from Internet-based MVPDs because a "consumer would be required to obtain an additional Internet access account, or, more likely, he or she would be consigned to use a bundled Internet/MVPD service with extra cost and co-opted consumer choice as to an individual's desired Internet access."[81] As Sky Angel noted in its comments, this would, in turn, favor incumbent cable operators, who a majority of Americans rely on for broadband Internet access.[82]

In addition to being contrary to statutory law and precedent, applying a facilities-based requirement to the MVPD definition would fail as a practical matter. Many current MVPDs deliver programming to subscribers without owning all of the distribution facilities. No wireless distribution system, including satellite, can be entirely facilities-based because a private entity is prohibited by statute from ownership of radio spectrum.[83] Wireless carriers distribute programming via a legal right – an FCC license – but not through ownership.[84] Cable over-builders also reach subscribers via legal rights but not through ownership. However, as noted above, for many years the Commission has classified satellite, other wireless carriers such as MMDS, and cable over-builders as MVPDs. Would the Commission remove the MVPD classification from these classes of distributors as an outcome of its ruminations in the instant proceeding? Moreover, many large, incumbent MVPDs have, or actively are pursuing, forms of "TV Everywhere" by which their subscribers may view live programming channels via Internet

[80] Comments of Affiliates Associations at 18.

[81] *Id.*

[82] *See* Comments of Sky Angel at 35.

[83] *See* 47 U.S.C. §301.

[84] *See* Comments of Public Knowledge at 10 ("[W]ireless systems like DBS and MMDS do not similarly 'provide' transmission paths. They use licensed spectrum to transmit information like any other wireless services. They did not build this spectrum and do not 'provide' it.").

access from any domestic U.S. location, whether within their own systems or outside of them.[85] Does DISH cease being an MVPD because it makes available to its 14 million subscribers Internet access to all of the live channels to which they subscribe at home (including Discovery channels)? Do Comcast, Cablevision, and TWC cease being MVPDs when their subscribers travel outside of their franchised service areas but receive the channels they subscribe to via an Internet connection and a "TV Everywhere" offering? Therefore, in addition to the obvious conclusions based on law and precedent, the Commission cannot graft a facilities-ownership condition onto the MVPD definition without causing irrational havoc to its current regulatory scheme.

IV. THE COPYRIGHT OFFICE DECISION THAT INTERNET-BASED DISTRIBUTORS DO NOT QUALIFY FOR THE CABLE COMPULSORY LICENSE IS IRRELEVANT HERE

Despite the claims of Cablevision and MPAA,[86] it is irrelevant that the Copyright Office has found that Internet-based video distributors do not satisfy the definition of a cable system in the Copyright Act and therefore do not qualify for the cable compulsory license found in Section 111 of the Copyright Act.[87] As the Affiliates Associations recognized, "[i]t is self-evident that the term MVPD under the Communications Act is much broader than the meaning of 'cable system' under Section 111 of the Copyright Act since the term MVPD encompasses satellite

[85] *See* Comments of Syncbak at 10 ("MVPDs increasingly are making their content available in ways that unquestionably go beyond the limits of their own physical plant, including various TV Everywhere initiatives and place-shifting technologies incorporated in MVPD-supplied hardware. The transmission paths for these services often extend beyond the MVPD's physical plant, and in other cases (such as TV Everywhere) the MVPD's physical plant may not be used at all.").

[86] *See* Comments of Cablevision at 15-16; Comments of MPAA at 3-6.

[87] *See* Comments of Adelphia Communications Corp., *et al.*, MM Docket No. 92-259, p. 26 (Jan. 4, 1993) ("The Commission does not have the discretion to apply the retransmission consent provisions of the statute any differently depending on whether the entity involved is covered by the compulsory copyright licensing provisions of the Copyright Act."); Comments of Time Warner Entertainment Company, L.P., MM Docket No. 92-259, p. 35 (Jan. 4, 1993) ("The Commission does not have the discretion to apply the retransmission consent provisions of the statute any differently depending on whether the entity involved is covered by the compulsory copyright licensing provisions of the Copyright Act.").

carriers which do not qualify for the Section 111 statutory license but instead required enactment of separate statutory licenses in Sections 119 and 122 of the Act."[88]

In fact, prior to the enactment of the Section 122 statutory license in 1999, which created a compulsory license for the retransmission of local television signals by satellite carriers, the Copyright Office concluded that satellite carriers failed to qualify for the Section 111 cable compulsory license, and therefore could not carry local broadcast signals.[89] Similar to its decision that Internet-based distributors do not qualify for the cable compulsory license, the Office found that "Congress intended the compulsory license to apply to localized retransmission services, and not nationwide retransmission services such as satellite carriers."[90] In the same decision, the Copyright Office also "conclude[d] that MDS and MMDS operations do not satisfy the definition of a cable system appearing in section 111, and therefore do not qualify for cable compulsory licensing."[91] The Copyright Office came to these conclusions despite the fact that both satellite carriers and MMDS operators are among the specifically enumerated examples of MVPDs in the statutory definition. In doing so, the Office noted that "it is not bound by FCC precedent, nor the definition of a cable system appearing in the Cable Act, in interpreting the definition of a cable system for section 111 purposes."[92]

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[88] Comments of Affiliates Associations at 10, n. 18.

[89] *See* Copyright Office, *Cable Compulsory License; Definition of Cable Systems*, Final Regulation, 57 Fed. Reg. 3284, 3292 (1992) ("*1992 Copyright Decision*") ("Satellite carriers are not cable systems under section 111 because they simply do not satisfy the definitional requirements, and do not fit within the constraints Congress has placed on the cable compulsory license.").

[90] *Id.*; *see id*. at 3290 ("[S]ection 111 is clearly directed at localized transmission services."); *see* Copyright Office, *Cable Compulsory Licenses; Definition of Cable Systems*, Final Rule, 62 Fed. Reg. 18705, 18707 (1997) ("*1997 Copyright Decision*") ("[T]he Office retains the position that a provider of broadcast signals be an inherently localized transmission media of limited availability to qualify as a cable system.").

[91] *1992 Copyright Decision*, 57 Fed. Reg. at 3296. These entities eventually qualified for the §111 compulsory license, but only because "Congress passed the Satellite Home Viewer Act of 1994, Public Law 103-369, which amended the definition of a 'cable system' in section 111 to include 'wireless' cable systems, such as the multichannel multipoint distribution systems." *1997 Copyright Decision*, 62 Fed. Reg. at 18706, n. 1.

[92] Copyright Office, *Cable Compulsory License; Definition of Cable Systems*, Notice of Proposed Rulemaking, 56 Fed. Reg. 31580, 31593 (1991).

Likewise, the Commission is not bound by any Copyright Office decisions, particularly when those decisions concern a statutory license which is restricted to cable systems, and which has an entirely different purpose and scope than the MVPD definition and the program access rules. For instance, in direct contrast to the broad MVPD definition, "[n]othing in the legislative history suggests that Congress intended an open-ended definition of the entities qualifying for the license. To the contrary, the compulsory license is hedged and qualified by strict limitations."[93] As a result, "the Office has always maintained that compulsory licenses are to be construed narrowly."[94] In addition, unlike Congress' treatment of MVPDs, the cable compulsory license was intended to be technology-specific.[95] Further, because "[t]he reasons offered for enactment of the cable and satellite licenses, and compulsory licenses in general, are essentially economic ones,"[96] the "Copyright Office is not imbued with authority to expand the compulsory license according to public policy objectives."[97] In contrast, the program access rules were specifically enacted to advance the public interest.

Moreover, the Copyright Office's recommendation that Congress not enact a new statutory license for Internet-based video distributors related only to web-based services, not an entity such as Sky Angel that simply relies on its subscribers' broadband Internet connections as one portion of its distribution system. For instance, the Office noted that "[t]here are currently

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[93] *Id.* at 31592.

[94] *1992 Copyright Decision*, 57 Fed. Reg. at 3291. In fact, the Copyright Office has repeatedly recommended the elimination of compulsory licenses, so it is not surprising that it would not recommend the expansion of the current licenses or the creation of a new license for Internet-based video distributors. *See* Copyright Office, *Satellite Home Viewer Extension and Reauthorization Act, Section 109 Report*, p. 85 (June 2008) ("*SHVERA Report*") ("[O]ur principal recommendation is that Congress should abandon Sections 111 and 119 of the Act. The Office finds that the need for these statutory licenses has dissipated over time."); *id.* at 82 ("It is clear to us that Section 111 is an anachronistic licensing scheme that cannot readily accommodate new types of services, such as IP, or changes in technology, such as digital television.").

[95] *See 1992 Copyright Decision*, 57 Fed. Reg. at 3295-96 ("It is [] counter-intuitive to assert that Congress intended a technology neutral compulsory license in 1976 applicable to all types and forms of video delivery systems…").

[96] *Statement of the Register of Copyrights Before the Subcommittee on Courts and Intellectual Property of the House Committee on the Judiciary*, 2000 WL 807143, at *2 (June 15, 2000) ("*Statement of the Register of Copyrights*").

[97] *1992 Copyright Decision*, 57 Fed. Reg. at 3292.

three different technological paradigms for openly distributing video programming, including broadcast content, over the Internet. One method is to stream video content that may be accessed by anyone with an Internet connection… The second method to deliver video content to end users is through server downloads. This type of delivery is epitomized by Apple's iTunes. The last method is peer-to-peer delivery."[98] Clearly, Sky Angel does not provide any of these distribution methods.

Accordingly, the reasoning behind the Copyright Office's recommendation to Congress does not apply to Sky Angel. For instance, the Office noted that web-based services have the "ability to disseminate programming 'instantaneously worldwide' without any territorial restrictions…"[99] Therefore, its "principal concern is the extent to which Internet retransmissions of broadcast signals can be controlled geographically."[100] In contrast, like a satellite carrier, Sky Angel has the ability to, and does, restrict its service to the United States.[101] The Office also noted that, with respect to web-based distribution services, "even if protection devices are in place to limit receipt of a broadcast signal from a source to a specific geographic location, there may be no control over the receiver of that signal that prevents him from further retransmitting the signal to others."[102] In contrast, Sky Angel's set-top box employs industry-standard copy protection that prevents the copying or further retransmission of the programming it

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[98] *SHVERA Report* at 181-82; *see id.* at 185 ("The Office continues to oppose an Internet statutory license that would permit any website on the Internet to retransmit television programming without the consent of the copyright owner.") (emphasis added); Copyright Office, *A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals*, p. 93 (Aug. 1, 1997) ("*1997 Copyright Report*") (noting that AudioNet, which was "the primary proponent of the eligibility of computer networks for the cable compulsory license," "broadcasts audio and some video events in real time via the Internet to anyone anywhere in the world who has a computer with audio capability and access to the World Wide Web.").

[99] *Statement of the Register of Copyrights*, 2000 WL 807143, at *4.

[100] *Id.* at *9.

[101] *See 1997 Copyright Report* at 97 ("[S]atellite technology … allows for the restriction of retransmissions within the United States").

[102] *Statement of the Register of Copyrights*, 2000 WL 807143, at *9.

distributes.[103] As the Copyright Office acknowledged, the availability of this type of technology weighs in favor of a compulsory license.[104]

The Copyright Office also recommended against a compulsory license for web-based distributors due to international considerations, but Sky Angel's service complies with the restrictions imposed by the Berne Convention for the Protection of Literary and Artistic Works ("Berne"). For instance, "Berne requires member countries to impose territorial limitations on retransmission that are carried out under a compulsory license,"[105] something that Sky Angel already does.[106] In fact, Sky Angel's service allows for greater territorial limitation than that of a satellite carrier, whose "'footprint' on the ground where the satellite signal can be received often crosses national boundaries."[107] Nevertheless, the Copyright Office found that satellite does not pose a problem with respect to Berne because, like Sky Angel, its "signals are encrypted and require a special decoder for viewing," which allows "territorial limitations [to] be enforced by controlling the availability of the decoders."[108] Regardless, this proceeding is wholly unrelated to compulsory copyright licenses, as Sky Angel has not sought to benefit from those statutory grants of authority. Rather, Sky Angel enters into written programming agreements with each of its content partners under which Sky Angel pays per-subscriber carriage fees.[109]

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[103] *See* Comments of Sky Angel at 3.

[104] *See Statement of the Register of Copyrights*, 2000 WL 807143, at *9 ("[T]echnological solutions may be developed to address these concerns, but until they are, and unless we can be confident of their reliability and security, enactment of a compulsory license for local signals would place broadcast programming in jeopardy.").

[105] *Id.* at *11; *see id.* ("In order to comply with Berne's territorial limitation on compulsory licenses, a compulsory license for retransmission of broadcast television signals on the Internet could only permit such transmissions for reception within the United States.").

[106] *See id.* at *12 ("[W]hether a Berne-compatible compulsory licensing regime is possible … depends largely on the business model adopted by an entity that wishes to retransmit television signals on the Internet.").

[107] *Id.*

[108] *Id.*

[109] And, if Sky Angel were to distribute the signal of a television station, or network, it would do so only after entering into a distribution agreement with that station or network.

V. CONGRESS USED THE PHRASE "MULTIPLE CHANNELS OF VIDEO PROGRAMMING" TO MEAN "MULTIPLE NETWORKS OF VIDEO PROGRAMMING"

With respect to video programming, the term "channels" is almost invariably used to mean "programming networks."[110] And, as the detailed legislative history provided by Sky Angel demonstrates,[111] Congress used "channels," as found in the MVPD definition, in this way.[112] Sky Angel also provided numerous examples where the Commission similarly used "channels" to mean "programming networks."[113] Moreover, this interpretation of "channels" would advance Congress' goals in enacting Section 628, as the clear intent of the program access regime is to increase competition, encourage new communications technologies, and protect a

[110] *See*, *e.g.*, Comments of DIRECTV at 11 (noting that such an interpretation would "accord with common usage."); Comments of Discovery Communications, Inc., MM Docket No. 92-265, p. 1 (Jan. 25, 1993) ("Discovery … owns and operates The Discovery Channel and The Learning Channel. Both channels provide programming to cable operators and other multichannel video distributors on a nondiscriminatory basis.") (emphasis added); *Cablevision Systems Development Co. v. MPAA*, 836 F.2d 599, 602, n. 3 (D.C. Cir. 1988) ("The words 'station' and 'channel' are synonymous for purposes of this opinion and refer to an entity that transmits by broadcast or cable a single regular schedule of programming. For example, a local affiliate of a network is a station or channel, as is a cable-originated entity such as ESPN…"); *SHVERA Report* at 35 ("AT&T is considered to offer a 'pure' IP service because all programming, including live television channels, are delivered on demand to U-Verse video customers. In fact, one of the biggest differences between traditional cable architecture and AT&T's model is how channels are tuned for the viewer. Cable operators deliver all programming from local headend servers to all subscribers, who are able to view channels based on their subscription package. With IP, AT&T delivers a video signal for an individual video programming service only after a subscriber selects it with a remote control. But to the subscriber, it would appear similar to traditional broadcast television, since the channel is delivered in less than 300 milliseconds.").

[111] *See* Comments of Sky Angel at 25-28; *see also* Comments of DIRECTV at 11 ("Congress contemporaneously understood and used the term in the same manner."); Comments of Affiliates Associations at iv ("Congress clearly used the term 'channel' in Section 602(13) in an everyday, non-technical sense to mean a stream or network of video programming."); Comments of Public Knowledge at 22 ("[I]n the context of the 1992 Cable Act 'channel' unambiguously refers to a stream of prescheduled video programming…").

[112] Notably, commenters making contrary arguments failed to provide any support for their assertions. *See*, *e.g.*, Comments of Discovery at 5 (failing to cite to any precedent in claiming that "nothing in the Communications Act or its history supports an argument that 'channel' was meant to have some alternate meaning"); *id.* at 6 (failing to cite to any precedent in claiming that "[u]se of the term 'channel' in the legislative history of the 1992 Act and in the FCC's own regulations confirm that Congress and the Commission both understand 'channel' in the MVPD context to mean the signaling path over which video programming is distributed."); Comments of TWC at 4 (failing to cite to any precedent in claiming that "[n]othing in the text or legislative history of the Act supports redefining the term 'channels' to mean 'video programming networks.'").

[113] *See* Comments of Sky Angel at 28-32; *see also* Comments of DIRECTV at 11 (noting that, in imposing public interest carriage obligations on DBS operators, the Commission adopted a "set-aside obligation [] measured by the number of 'channels' of video programming networks … rather than the number of satellite transponders.") (citing *Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd. 1589, ¶ 13 (1993)).

consumer's ability to access one or more programming networks – *i.e.*, The Discovery Channel or other programming 'channels' – from its preferred distributor at affordable rates.[114]

Sky Angel also detailed why it is not only reasonable, but mandatory, for the Commission to interpret the MVPD definition without reference to the earlier-adopted, and entirely separate, definition of "channel," which is expressly synonymous with "cable channel."[115] Various commenters agree with all of the supportive points made by Sky Angel in this respect. For instance, AT&T notes that this definition is "expressly limited only to a cable system,"[116] and therefore "applies solely to a cable system, not to any other type of MVPD."[117] The fact that Congress included "channel" as a short-hand reference to "cable channel" does not alter this analysis because the ease of use it created in drafting the 1984 Cable Act "made sense at the time insofar as the only MVPDs were cable systems."[118] Any argument to the contrary – *i.e.*, that Congress intended the definition to apply to the use of the term "channel" in every section of the Cable Act, including those adopted eight years later – "founders on the fact that section 602(4) is limited expressly and only to channels 'used in a cable system.'"[119]

Various commenters also agree that Congress, by not altering the definition of "cable channel" when it adopted the MVPD definition years later, did not intend for "MVPD" to be

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[114] *See* Comments of Sky Angel at 24-25; Comments of Public Knowledge at 4 ("[T]he word 'channel' in the 1992 Cable Act should be given a 'content' reading, since only that reading is consistent with the Act's pro-competitive purposes").

[115] *See* Comments of Sky Angel at 21-24.

[116] Comments of AT&T at 4.

[117] *Id.* at 3; *see* Comments of Affiliates Associations at iv ("The broad statutory definition [] cannot be limited by the technology-specific definitions of the terms 'channel' and 'cable channel' that appear elsewhere in the statute.").

[118] Comments of AT&T at 5; *see Amer. Scholastic TV Programming Found. v. FCC* 46 F.3d 1173, 1179 (D.C. Cir. 1995) ("The singular focus on the regulation of cable systems holds throughout the [1984 Cable] Act."); *id.* at 1180, n. 5 ("The 1992 Amendments to the Act include some references to the 'multichannel video market' generally … These amendments, of course, do not elucidate the intent of the earlier Act.").

[119] Comments of AT&T at 4.

interpreted by reference to that cable-specific definition.[120] "Under well-established canons of statutory construction, the Commission cannot adopt an interpretation of that definition that would read out of the Act the express limitation included by Congress."[121] This is because "[t]here is simply no way that the cable-centric definition of 'channel' can be squared with the list of non-cable providers listed in the definition of 'MVPD.'"[122] Accordingly, "it is not a matter of 'ignoring' the statutory definition of 'channel,' but rather of recognizing from the context that its meaning as used in the definition of 'MVPD' can be something different than its meaning in other contexts."[123] In other words, the FCC simply cannot accept this irrational narrowing of the MVPD definition unless it intends to declassify many video distributors from the current MVPD definition, including DISH and DIRECTV.

Sky Angel also noted that, because "Congress did not differentiate among the technologies used by competitors in the program access provisions,"[124] "channels" cannot be defined by any technology-specific reference. In fact, because Congress intended the 1992 Cable Act "to promote competition from alternative providers and technologies in the video space, it plainly did not intend to limit the term MVPD to those using a particular technology."[125] "Instead, it is plain that Congress in Section 602(13), as it has done elsewhere, used a term with a

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[120] *See, e.g., id.*

[121] *Id.*

[122] Comments of DIRECTV at 5; *see* Comments of Affiliates Associations at 7-8 ("If the statutory definition of 'channel' were strictly and literally incorporated into the definition of MVPD, and thus the requirement that a channel be 'used in a cable system' were construed as an absolute definitional limit, then the non-cable entities that are among the statutorily enumerated MVPDs – such as DBS and MMDS – would actually not be MVPDs themselves since none could meet the statutory definition of a 'cable system.' That result would obviously be an absurdity.").

[123] Comments of DIRECTV at 6.

[124] *Implementation of Cable Television Consumer Protection and Competition Act*, Memorandum Opinion and Order on Reconsideration of the First Report and Order, 9 FCC Rcd 1902, 1950 (1994).

[125] Comments of AT&T at 5; *see* Comments of Affiliates Associations at 7 ("[A]s a fundamental matter of both statutory construction and common sense, the Bureau *cannot* read the highly technical statutory definition of 'channel' as a limitation upon the otherwise expansive definition of MVPDs.") (emphasis in original).

potentially technical meaning in the everyday sense in which it has been used in discussions of communications policy issues."[126]

Finally, "[i]f the definition of channel were read technically to limit 'channels' to those provided by cable systems, Section 602 (and, in particular, subsections (4) and (13)) would be hopelessly irreconcilable, and only cable systems, but none of the other entities expressly enumerated as MVPDs, would be capable of providing 'channels' of programming."[127] In contrast, all of the words in the MVPD definition "have meaning if, and only if, the term 'channel' used in that section is construed in an everyday, non-technical sense" to mean programming network.[128] Discovery, Cablevision, and TWC argue the exact opposite – that interpreting "channel" to mean "programming network" would render use of the word "channels" superfluous. But this argument stretches the bounds of reason, as Cablevision demonstrated when it claimed that interpreting "channels" to mean "networks" would "effectively rewrite[] the phrase as 'video programming network of video programming.'"[129] Clearly, the proper interpretation would be "multiple networks of video programming." In fact, interpreting "channel" to mean a transmission path as these commenters argue, and thus requiring that an entity "make available multiple transmission paths of video programming," would be unworkable because it would exclude various "traditional" MVPDs, including many cable systems that rely on Switched Digital Video technology.

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[126] Comments of Affiliates Associations at 7 (internal quotation marks omitted).

[127] *Id.* at 8; *see id.* at iv ("A contrary conclusion would render Section 602(13) and 602(4) hopelessly irreconcilable and the statutory definition of MVPD largely meaningless, as the non-cable entities expressly identified as MVPDs by statute (such as DBS and MMDS) are incapable of delivering 'channels' of programming via a 'cable system.'"); Comments of AT&T at 5 ("The only reasonable reading of the reference to 'multiple channels of video programming' in the definition of MVPD is that Congress was referring to those entities distributing access to multiple programming networks – not those distributing multiple 'portion[s] of the electromagnetic frequency spectrum which [are] used in a cable system.'").

[128] Comments of Affiliates Associations at iv; *see id.* at 9.

[129] Comments of Cablevision at 13; *see* Comments of Discovery at 8; Comments of TWC at 5.

In sum, because (i) Congress consistently used the term "channels" in the common, everyday sense, (ii) Congress did not define "channels" as used in the MVPD definition, (iii) using the "cable channel" definition would exclude all MVPDs except for cable operators from the MVPD definition, (iv) equating "multiple channels" with "multiple transmission paths" would exempt many "traditional" MVPDs from the scope of the MVPD definition, and (v) interpreting "multiple channels" to mean "multiple networks" would advance the purposes of the program access rules, the only reasonable and non-arbitrary way to define an MVPD is simply to require that an entity "makes available for purchase, by subscribers or customers, multiple networks of video programming."[130]

VI. THE PUBLIC INTEREST REQUIRES THAT SKY ANGEL'S INNOVATIVE SERVICE BE CLASSIFIED AS AN MVPD ENTITLED TO THE PROTECTIONS OF THE PROGRAM ACCESS RULES

As Sky Angel detailed in its comments, permitting new types of video programming distributors to obtain the program access protections is necessary to advance the competitive benefits Congress sought to achieve in order to benefit consumers.[131] New Internet-based competitors also will encourage broadband adoption.[132] Various commenters likewise noted these and other public interest benefits that would arise from a proper interpretation of the

[130] *See* Comments of Public Knowledge at 2 ("As used in the Cable Television Consumer Protection and Competition Act of 1992, a 'channel' is a stream or signal of prescheduled video programming. Since an online distributor like Sky Angel offers 'channels' in this sense just as DirecTV or Time Warner Cable do, such distributors meet the definition of MVPD.").

[131] Comments of Sky Angel at 36-40; *see* Comments of National Ass'n of Broadcasters ("NAB") at 2 ("Increased competition is a long-standing public policy goal, one that can be a positive for consumers, broadcasters and other program providers.").

[132] *See* Comments of Sky Angel at 40; Comments of M3X at 3 ("It is undeniable that video will be the singlemost economic driver of broadband deployment and penetration."); Copyright Office, *Satellite Television Extension and Localism Act, §302 Report*, p. 33 (Aug. 29, 2011) ("Just as cable and satellite have slowly replaced broadcast television as the dominant mass communications medium in the United States, it is possible and probably likely that the Internet will replace cable and satellite as the preferred way to consume broadcast and cable content in the majority of American households."); Comments of Verizon at 10 ("To provide consumers with the best picture quality, [over-the-top, IP-based video] services require high-speed connections. Broadband providers made – and continue to make – the investments necessary to provide consumers with those high-speed connections. As a result, over-the-top, IP-based video … 'will account for over 50 percent of consumer Internet traffic' by the end of this year.").

MVPD definition. For instance, Syncbak noted that "[m]ore competition fosters innovation, efficient use of resources, and economic growth," which "is good for consumers."[133] And WGA explained that, "[g]iven the market concentration and rising costs to consumers, it is vitally important to the competitive landscape that MVPDs include not only those entities that provide the transmission path but also those that utilize new distribution platforms, such as the Internet, to deliver video programming."[134]

In addition to lower prices and increased innovation due to enhanced competition, Public Knowledge also noted that consumers would benefit because they will be able "to choose from between a large number of competitive MVPDs instead of being limited to the same few options, year after year."[135] And WGA detailed how these additional options would benefit consumers:

> Sky Angel provides a service to a niche market of consumers seeking access to family-friendly networks and programs. Because these consumers wish for religious reasons to subscribe to some, but not all, cable channels, they are underserved by existing MVPDs that do not offer packages tailored to their needs. Moreover, because these consumers are spread across the country, it would not be economically feasible for an entity to develop its own infrastructure to serve this market segment. Without Sky Angel's ability to use the Internet as a distribution link, these consumers would remain underserved.[136]

Clearly, finding that Sky Angel qualifies as an MVPD would promote diversity in an industry currently subject to an oligopoly structure.[137]

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[133] Comments of Syncbak at 6; *see* Comments of WGA at 1 ("[A] technologically specific definition would limit the potential of the Internet to enhance competition and innovation in video programming delivery.").

[134] Comments of WGA at 3; *see id.* ("Concentration in the MVPD market helps explain why cable prices continue to rise faster than the consumer price index (CPI). The lack of effective competition allows the oligopoly firms to raise prices above that of a competitive market and maximize profit at the expense of consumers.").

[135] Comments of Public Knowledge at 17.

[136] Comments of WGA at 4; *see* Comments of NAB at 3 ("Greater platform choice, developed in a manner that respects the rights of content and signal providers, will provide benefits for consumers. For example, it is easy to see that consumers would benefit from development and deployment of new, competitive distribution platforms capable of customizing programming… Such customization may result in cost savings or increased access to programming of particular interest to the viewer.").

[137] *See* Comments of WGA at 2 ("The WGAW is extremely concerned with the lack of meaningful competition and diversity in the market for the delivery of video programming. The detrimental impact market concentration has on

Broadcasters also support an interpretation of "MVPD" that would include distributors similar to Sky Angel. NAB noted that the additional distribution opportunities provided by new MVPDs would lead to increased revenue, which could "be used to enhance news, entertainment and public service programming – furthering the objective of localism."[138] Increased revenue "could also encourage greater innovation in digital television programming, including multicast and high definition [] programming."[139] And the Affiliates Associations noted that a "contrary reading of the statute could have dire consequences for television broadcasters and the important public interest they serve, as (among other things) such programming providers would then not be obligated to obtain a television station's consent before retransmitting its broadcast signal."[140]

Sky Angel also noted in its comments that promoting the entry and viability of additional competitors benefits independent content providers.[141] NAB agreed, explaining how the "emergence of additional platforms for the distribution of video programming will provide programmers with additional outlets for reaching viewers and therefore with greater opportunities for success in the marketplace"[142] because it will increase programmers' license fees and advertising revenues.[143] Another reason why independent programmers would benefit is because, "[w]hile the program access rules prevent an MVPD from keeping a programmer

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news, information and entertainment content across distribution platforms harms both democratic discourse and the democratic process.").

[138] Comments of NAB at 3.

[139] *Id.* at 3-4; *see id.* at 3, n. 6 ("In economic terms, the emergence of new outlets and distribution platforms will allow broadcasters, by disseminating programming to a wider audience, to take advantage of economics of scale and reduce their average cost per viewer.").

[140] Comments of Affiliates Associations at v; *see id.* at 15 ("Such a result would seriously undermine the purpose of the retransmission consent regime and the weighty public interests that regime is intended to serve."); Comments of Saga at 3; Comments of NAB at 4.

[141] *See* Comments of Sky Angel at 40.

[142] Comments of NAB at 3.

[143] *See* Comments of Sky Angel at 40; Comments of Discovery Communications, Inc., MM Docket No. 92-265, p. 10 (Jan. 25, 1993) ("The amount of advertising revenue is directly related to the size of a program service's subscriber base."); *id.* at 11 ("To maximize its advertising revenues, Discovery sells to all interested customers, including alternative technology distributors.").

from being carried by other current MVPDs, nothing at the moment prevents a company like Comcast demanding, as a condition for being carried on Comcast, that the programmer stay off of online platforms."[144]

In contrast, if the Commission improperly restricts the breadth of the MVPD definition, "numerous unintended consequences will follow [that] go beyond the anti-competitive and anti-consumer effects that would be expected to follow from artificially restricting market entry."[145] For instance, while a broad interpretation of "MVPD," as Congress intended, would "ensure that the Commission's program access rules continue to promote competition as technology changes,"[146] an unnecessarily narrow, technology-specific interpretation could strip the Commission of the authority necessary to adequately regulate various "traditional" MVPDs.[147] Public Knowledge similarly recognized this potential harm:

> [I]f the Bureau continues to hold that an MVPD must provide its subscribers with a transmission path, then any programming that is delivered without a fixed transmission path may become ineligible. IP-based MVPDs such as U-Verse that may not assign particular programming networks particular frequencies may not provide any 'channels' at all if 'channel' is defined in this way. Switched digital networks on cable systems may no longer count as 'channels' since they are not continually broadcast on a fixed 'portion of the electromagnetic frequency spectrum.' And any MVPD would simply be able to spin off its facilities into a separate affiliate and then lease them back in order to avoid MVPD regulation.[148]

As a consequence, "MVPDs would have an incentive to engineer their systems inefficiently just to qualify for, or fall outside of, particular rules."[149] Such a regulatory scheme

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[144] Comments of Public Knowledge at 17-18.

[145] *Id.* at 15.

[146] Comments of WGA at 5.

[147] *See* Comments of Sky Angel at 41.

[148] Comments of Public Knowledge at 15-16; *see* Comments of Syncbak at 11 ("[A] contrary determination might permit an MVPD to escape regulation simply by separating its programming and transport services into separate business units.").

[149] Comments of Public Knowledge at 16-17; *see* Comments of Consumer Groups at 10 ("This mandate sensibly guarantees that consumers will have access to video programming even where future market developments lead MVPDs to alter the underlying technical means by which they deliver their programming.").

therefore "would invite manipulation and abuse."[150] For instance, "[w]ithout a mechanism for non cable interests to achieve online MVPD status, cable interests remain free to establish their own online video distribution systems to exclusively distribute their attributed cable programming services, accomplishing in broadband precisely what Section 628 was intended to prevent while creating a drag on the transition to national broadband."[151] Based on the initial comments, it appears some MVPDs hope for this result. For instance, Verizon urges the Commission to "confirm that a provider is not an MVPD when offering an over-the-top, IP-based video service, even if that same provider offers a separate, facilities-based video service and qualifies as an MVPD when it does so."[152] This would permit Verizon and other MVPDs to escape the various public interest regulations, including the program access rules, with respect to any IP-based services.

Another policy benefit that would arise from properly interpreting "MVPD" to include every entity that fits within the express terms of that statutory definition is that "it would ensure similar treatment of similarly situated entities."[153] In other words, "[t]o the extent an entity actually operates as an MVPD (*i.e.*, it sells multiple, full-time, linear channels of programming to subscribers), this regime establishes basic regulatory parity," which would "create a more level playing field for all those attempting to attract subscribers to linear programming services"[154] and would "further[] the goal of fostering a competitive marketplace."[155] TWC and Verizon also agree that the Commission should pursue regulatory parity, but they argue that the best method is

[150] Comments of Affiliates Associations at 18.

[151] Comments of M3X at 4; *see* Comments of Public Knowledge at 17 ("The Commission has seen ample evidence of exactly this kind of behavior – MVPDs have continually tried to skate around FCC and Congressional policy by delivering programming via terrestrial wires instead of satellite, providing only the standard definition and not the high definition versions of feeds to competitors, and so forth.").

[152] Comments of Verizon at 2.

[153] Comments of DIRECTV at 13.

[154] *Id.* at 14.

[155] Comments of NAB at 6.

to abolish regulation with respect to all MVPDs, rather than promote the public interest by applying pro-consumer, pro-competition rules to innovative new distribution services.[156]

Along these same lines, some commenters argue that properly interpreting "MVPD" to include a distributor such as Sky Angel could deter investment and dampen innovation in the marketplace because additional entities would be subject to regulation.[157] But these commenters greatly exaggerate the extent of this regulation,[158] as a review of the MVPD regulations clearly demonstrates:[159]

- Because of the Twenty-First Century Communications and Video Accessibility Act of 2010 ("CVAA"), all Internet-based distributors of video programming, including web-based, non-linear services, now have closed captioning obligations.[160]

- The program carriage rules would have little, if any effect, because they do not mandate carriage.

- The video description rules apply only to large MVPDs, and only with respect to the top-five non-broadcast networks. In addition, these rules only require fifty hours of described programming per calendar quarter, and these descriptions likely will be provided by programmers, not MVPDs. At the same time, these rules make programming more accessible to individuals who are blind or visually impaired.

- The retransmission consent rules do not mandate carriage, but rather simply require MVPDs to act in good faith while ensuring that broadcasters are adequately compensated for the retransmission of their signals.

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[156] *See* Comments of TWC at 2 ("[T]he best way to pursue regulatory parity is to eliminate unnecessary regulatory obligations (*i.e.*, regulate incumbents 'down' to the level of the unclassified new entrant)"); Comments of Verizon at 13, n. 19 ("To the extent the Commission is concerned about ensuring a level playing field among the providers of these various services, the proper approach is to eliminate legacy regulatory requirements on MVPDs…").

[157] *See* Comments of MPAA at 3; Comments of Open Internet Coalition at 5. In addition, Verizon implies that the Commission would also be regulating the Internet itself, *see* Comments of Verizon at 9, but, in reality, the Commission would be simply regulating the monopolistic programming practices of vertically-integrated MVPDs, irrespective of the technology used to distribute such programming.

[158] *See*, *e.g.*, Comments of Computer & Communications Industry Ass'n ("CCIA") at 1 (describing the Commission's MVPD rules as "expensive and complicated regulatory burdens").

[159] *See*, *e.g.*, Public Notice at ¶ 2; Comments of Comcast at 12-13; Comments of ACA at 3.

[160] Comcast argues that the CVAA would have been unnecessary "if Congress believed that OVDs fall within the statutory definition of MVPDs." Comments of Comcast at 7, n. 18; *see also* Comments of ACA at 21-22. But these commenters fail to recognize that the CVAA's online captioning requirements are far broader than the proper scope of the MVPD definition because the CVAA applies to services that are web-based, provide non-linear programming, and/or do not charge a fee. Clearly, then, the CVAA is not redundant.

- Although the navigation device requirement "nominally applies to all MVPDs," the Commission "has applied its rules only to cable operators."[161]

- Finally, the Commission's Equal Employment Opportunity ("EEO") rules, which inarguably serve a laudable goal, are not oppressive, and in fact are less burdensome than many states' generally applicable EEO laws.

It is difficult to understand how some commenters described these regulations, which would not impose undue burdens on emerging video distributors, as "unnecessary,"[162] "outdated,"[163] or leading to "no discernible benefit."[164]

Moreover, those commenters that exaggerated the potential harms arising from the MVPD regulations clearly were focusing on web-based, non-linear distribution of video programming. For instance, Discovery referred to "an unknown and unlimited number of online sources,"[165] Comcast claimed that "*every* party in this space" would become subject to regulation,[166] the ACA argued that "online distributors would automatically become obligated,"[167] and the MPAA speculated about what would happen if "every video player were treated as a regulated entity."[168] However, as detailed above, most Internet-based video distribution services would not be classified as MVPDs under the proposed interpretation, and certainly would not be classified as MVPDs as a consequence of a particularized finding with

[161] FCC, *Connecting America: The National Broadband Plan*, p. 50 (Mar. 2010).

[162] Comments of CCIA at 5.

[163] Comments of Verizon at 9.

[164] Comments of Comcast at 10. Indeed, it is highly unlikely that the incumbent MVPDs which make these arguments do so in a good faith effort to protect their potential competitors from regulatory burdens.

[165] Comments of Discovery at 12.

[166] Comments of Comcast at 10 (emphasis in original).

[167] Comments of ACA at 29.

[168] Comments of MPAA at 3. The MPAA also claims that interpreting the MVPD definition in accordance with its plain terms, and thereby regulating Internet-based distributors of subscription packages of linear channels, would "upset[] settled expectations that have formed the basis for marketplace negotiations." Comments of MPAA at 2. But the only precedent it provides for this assertion is the Bureau's refusal to grant Sky Angel a standstill. It is difficult to see how a recent Bureau-level decision that expressly did not reach the merits of Sky Angel's program access complaint or the nature of its service could have created any "settled expectations" in the industry.

respect to Sky Angel, which is all that is necessary to move the program access dispute proceeding forward. The Commission therefore must not allow these exaggerated potential effects of accurately interpreting the MVPD definition to affect its decision in Sky Angel's program access complaint proceeding.

VII. CONCLUSION

Based on the foregoing, the Commission cannot reasonably, or legally, determine that Sky Angel fails to qualify as an MVPD entitled to the pro-consumer, pro-competition protections of the program access rules. Far-reaching inquiries are unnecessary to Sky Angel's program access complaint against Discovery, which has been frozen under the weight of FCC regulatory inertia for approximately 27 months, when the Commission itself imposes a five-month standard for resolving program access complaints.

Based on Sky Angel's prior filings in the program access dispute proceeding, Discovery clearly has discriminated against Sky Angel in violation of the program access rules, to the detriment of Sky Angel's subscribers and potential subscribers. Action on Discovery's program access violations, along with its wanton disregard of FCC-authorized discovery obligations and its overt lack of candor, remain in limbo.[169] In all likelihood, this proceeding still would be stuck in neutral but for scrutiny by the D.C. Circuit Court of Appeals, which promptly responded to Sky Angel's Petition for Writ of Mandamus. In short, Sky Angel is wholly deserving of an immediate finding that it qualifies as an MVPD. The Commission therefore should find in favor of Sky Angel, with no further delay, and grant all relief requested in Sky Angel's program access complaint. If, however, the Commission cannot resolve the law and equities promptly, then at a

[169] At no point in Public Notice did the Bureau even mention that Sky Angel's Motion to Compel has been pending for nearly 26 months, or that its Motion for Sanctions due to Discovery's lack of candor has been pending for almost 13 months, both without any action at all.

minimum, it should grant immediately Sky Angel's *Renewed Petition for Temporary Standstill*, which has been languishing for 13 months unaddressed.

Respectfully submitted,

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